

HIGH COURT OF JUDICATURE CHHATTISGARH : BILASPUR**WRIT PETITION NO. 1850 OF 2003**

PETITIONER		Shrikishan & Company, Through its Proprietor, Sushil Agrawal, S/o Late Kishan Agrawal, aged about 37 years, R/o Darri Road, Korba, District- Korba. (C.G.)
	- Versus-	
RESPONDENTS	1.	State of Chhattisgarh, Through the Secretary, Panchayat and Rural Development Department, DKS Bhawan, Raipur (C.G.)
	2.	The Chief Engineer, Pradhan Mantri Gram Sadak Yojna Development Commissioner Office, Civil Lines, Raipur(C.G.).
	3.	The Executive Engineer, Pradhan Mantri Gram Sadak Yojna Raigarh, District-Raigarh (C.G.).
	4.	Central Vigilance Commission, Jaisalmer House, Man Singh Road, New Delhi- 110011.
	5.	Maa Shakmberi Constructions Through its Proprietor, Shri Sampat Sharaf, R/o Dhannupali, Sambalpur, District- Sambalpur (Orissa).

POST FOR ORDER ON 25th July, 2003.

Sd/-
L.C.BHADOO
 Judge

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ORDER25th July, 2003)**By Justice L. C. Bhadoo.**

1. The main grievance of the petitioner/Company in this petition under Article 226 of the Constitution of India is against the decision of the Respondents No. 2 and 3 to enter into the negotiations with all the tenderers asking them to send their negotiated rates in a sealed envelope and not to accept the petitioner's tender even though the rates quoted by him were lowest. The petitioner Company has filed this

petition with the averments that the Chief Engineer, Pradhan Mantri Gram Sadak Yojna had floated the tender for road and cross drainage works for various areas under Pradhan Mantri Gram Sadak Yojna including the maintenance of the same for five years after the construction. The tender notice was published on 16th April 2003. In response to the said tender notice the petitioner had applied for Group No.18 i.e. Raigarh CG-13-7. The estimated cost Rs. 513.18 lacs was fixed by the respondent No.2. The petitioner quoted the rate 4.8% below the estimated value whereas the rate quoted by the Respondent No.5 was 5% above the estimated cost value. After opening the tender it was found that the rates quoted by the petitioner was lowest therefore in all fairness the tender of the petitioner should have been accepted by the Respondents No. 1 to 3 but to the utter surprise of the petitioner the Respondent No.2 had decided to negotiate with the petitioner and also with the Respondent No.5, both were called by the Respondent No.2 and they were asked to give their rates in sealed envelope under the negotiation. After receiving the negotiation offer the petitioner had submitted his rates under negotiated offer as 11.7 % below the estimated cost therefore the Respondents No. 1 to 3 should have awarded the tender to the petitioner but to the utter surprise they have also asked the Respondent No.5 to submit negotiated offer and according to the confirmed information of the petitioner the rates quoted by the petitioner in the negotiated tender were disclosed to the Respondent No.5 by the Respondent No.2 and therefore the Respondent No.5 had quoted his rates as 14.7% below the estimated cost. Since the

negotiated revised rates of the respondent No.5 are lower than the rates quoted by the petitioner therefore the Respondents No. 1 to 3 have decided to award the work to the Respondent No.5.

2. The petitioner has further submitted in his petition that the Respondents No. 1 to 3 were not within their right to award the work to the Respondent No.5 on the revised rates given by the Respondent No.5 because the petitioner was the lowest bidder therefore the same should have been accepted as it was. More over, if the negotiation has to be done this can only be done with the L-1 (Lowest Tenderer) and not with the Respondent No.5. Now it is settled law that how the tender is to be finalized and the manner in which the negotiations are to be concluded. Even the Respondent No.4 (Central Vigilance Commission) has issued very categorical directions to all the departments of the country saying that "It is only L-1, who can be called for negotiations to avoid corruption and to have more transparent and effective system. These directions were issued on 18.11.1998, copy of which is enclosed as Annexure P/7 with the petition. The action of the respondents No. 1 and 2 is prima-facie illegal, arbitrary and against the law. It is expected from the State Government to act fairly and honestly while awarding the tender to anyone. They cannot do any favour to any particular group or person for the best reasons known to them only. It is submitted that there is no rule, which authorizes the Respondents No. 1 and 2 to call other tenderers for negotiation whose rates have not been found lowest. Ultimately prayed that the Respondents No. 1 to 3 be

directed to produce the entire record of the group No.18 of the tender dated 16.4.2003 and further prayed that they be directed to award the tender to the petitioner on the basis of the rates quoted by him and not to award any tender in favour of the Respondent No.5.

3. Return has been filed on behalf of the Respondents No. 1 to 3. In reply to the petition they have submitted that the petitioner, Respondent No.5 and Shri Balaji Engicons Pvt. Ltd. were the tenderers and all the there were called for negotiation as per the provisions contained in Para 2.086 of the M.P. Works Department Manual. Copy of Chapter-II of the M.P. Works Department Manual regarding the procedure of tender and contract has been filed as Annexure R/1 along with the return. The relevant clause (a) of para 2.086 of the Manual regarding procedure for negotiation of tender is relevant for the present context which reads as "All the tenderers who had tendered their rates in that particular tender, for which the negotiations are considered suitably should be called for negotiations with a view to withdraw conditions and reduce the rates." It is further submitted that all the three tenderers were called for negotiations and they were asked to reduce their rates and accordingly the petitioner, Respondent No.5 and Shri Balaji Engicons Pvt. Ltd. submitted their revised offer rates in sealed envelope. The petitioner has submitted his revised rate 11.7% below the schedule of rates whereas Respondent No.5 submitted his rate 14.70 below the schedule of rate. Similarly Shri Balaji Engicons Pvt. Ltd. submitted its rate 4.8% below the schedule of rate. When the petitioner came to know that his

rates are not the lowest one then he directly rushed to this Hon'ble Court for getting shelter. It is pertinent to mention that the petitioner has participated in the negotiation along with other two tenderers and thereafter he has got no legal right or interest to challenge the action of the answering respondents regarding negotiations. He should have raised objection when offer of negotiation was made. Later on he is stopped from challenging the action of the respondents in which he has taken part. The answering respondents submitted that the tender has not been finalized and the contract has not been awarded to any of the tenderers as the tender is under the process of scrutiny. The petition of the petitioner is that being lowest tenderer only he should have been called for negotiation and no other tenderer. It is submitted that the price cannot be only decisive factor for acceptance of tender and award of contract.

4. The Respondents No.1 to 3 have further submitted in their return that the scope of judicial review in the field of contractual matter is very limited and does not extend beyond the limited scrutiny to see the decision making process and is not to review the merits of the decision in support of which the application for judicial review is made. The power of judicial review is not an appeal against decision; the Court would not like to substitute its own decision. The Government is a guardian of the finances of the State and the right to refuse the lowest or any other tenderer is always available to the Government. As per the settled law in the matter of tender a lowest tenderer can not claim an enforceable right to get the tender and award of the contract

whether it is a private party or public body or State as it is essentially a commercial transaction. The petition of the petitioner is based on misplaced facts that the action of the answering respondents is illegal and arbitrary. The petitioner is not entitled for award of contract only on the ground that he was the lowest bidder. The contents of para 5.7 are denied as false. It is specifically denied that after receiving the negotiated offer from the petitioner, the respondent No. 1, 2 and 3 should have awarded the tender to the petitioner, but they asked the Respondent No.5 to submit negotiated offer. It is further denied that the Respondent No.2 has appraised the Respondent No.5 about the rates quoted in the negotiated tender by the petitioner. The petitioner's allegation in this respect is vague so as to get anyhow the contract in his favour. It is denied that the action of the Respondent No. 1 and 2 are prima facie illegal, arbitrary and against the law. It is submitted that the answering respondents have acted in just fair and reasonable manner in the process of awarding contract, which has not yet been finalized. Ultimately the respondents have prayed that the petition be dismissed with cost.

5. The Respondent No.5 has also filed almost the similar return and submitted that it is pertinent to mention here that the Divisional Manager has given merit certificate to the answering respondent for executing the work of construction by maintaining the high standard of quality and workmanship within stipulated time. Copy of such certificate is filed as Annexure R/1 along with his return. In view of the

above-referred circumstances the answering respondent is one of suitable tenderer and also his rate was the lowest one.

6. I have heard Shri P. Diwakar, learned counsel for the petitioner, Shri Sanjay K. Agarwal, Deputy Advocate General for the Respondents No. 1 to 3, and Shri Prafull Bharat, learned counsel for the Respondent No. 5.

7. Learned counsel for the petitioner has argued almost what has been mentioned in the petition and submitted that the petitioner being lowest tenderer in the bid he should have been awarded the contract. More over in view of the guide line issued by the Central Vigilance Commission and in order to curb corruption and to have more transparent and effective system the respondents No. 1 to 3 should have called only to the petitioner for negotiation and by inviting other parties they have acted in an illegal and arbitrary manner. He further submitted that the rates, which were quoted by the petitioner in negotiations in a sealed envelope, were disclosed to the respondent No. 5. He further submitted that the law on the point is that in the matter of contract which is entered by the State Government with the private parties looking to the arbitrary and illegal actions the power of judicial review is always available to the Courts, therefore in the given circumstances the petition of the petitioner deserves to be allowed and the respondents be directed to award the contract in favour of the petitioner. In support of his submission learned counsel for the petitioner relied upon a decision of the Apex Court reported in (2001) 2 SCC 451 W.B. State Electricity Board Vs. Patel Engineering Co. Ltd. and others, and another decision relied upon by learned

counsel for the petitioner is reported in (1999) 6 SCC 667 Common Cause, a Registered Society Vs. Union of India & others.

8. On the other hand learned counsel for the respondents argued that in order to get the best rates and best contracts the respondents are always at liberty to invite all the tenderers for negotiation in order to get the reduced rates and best contract. He further submitted that in view of Para-2 .086 of the M.P. Works Department Manual the respondents No. 1 to 3 are entitled to invite all the tenderers for negotiation with a view to withdraw the conditions and reduce rates and in consonance of this provision the respondents have entered into the negotiations and invited the reduced rates in a sealed envelop on a specific date, time and place, and the envelopes were opened in the presence of all the parties. Therefore no illegality or arbitrariness has been committed by the respondents and the petition of the petitioner is liable to be dismissed. In support of his argument learned counsel for the respondents relied upon a decision of Hon'ble Apex Court reported in (1999) 1 SCC 492 Raunag International Ltd. Vs. I.V.R. Construction Ltd. and others, and also relied on a decision reported in AIR 1996 SC 51 Sterling Computers Ltd. Vs. M/s M & N Publications Ltd. and others.

9. Now coming to the case laws cited by the learned counsel for the petitioner the Hon'ble Apex Court in the matter of W.B. State Electricity Board (Supra) has held that Rules and instructions must be complied with scrupulously in order to avoid discrimination, arbitrariness and favouritism which are

contrary to rule of law and constitutional values. Relaxation by State or its agencies of a rule or condition in favour of a particular bidder, held, not permissible unless expressly provided for in the rules. Adherence to the rules, held, is the best principle to be followed in the public interest. Principle of awarding contract to lowest tenderer, held applies when all things are equal - There is no obligation to award contract to lowest bidder - It is open to Government or its agency to negotiate with next lowest bidder and try to reach an economically viable and mutually acceptable price.

10. In the matter of Common Cause (Supra) it has been held by the Hon'ble Apex Court that the Govt.'s decisions regarding award of contract are always open to the judicial review and if the decision making process is shown to be negotiated by arbitrariness, unreasonableness, illegality and arbitrariness then the Court can strike down the decision making process as also the award of the contract based on the decision. The Court held that this was laid down in Tata Cellular Vs. Union of India.

11. In the case of W.B. State Electricity Board (Supra) the Hon'ble Apex Court in para-14 of the judgment observed that the principles governing the exercise of the powers by the High Court, a three-Judge Bench of this Court has, after exhaustive consideration of a long line of authorities, succinctly summarized the position and laid down the following principles in Tata Cellular Vs. Union of India:-

- (i) The modern trend points to judicial restraint in administrative action.

- (ii) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (iii) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (iv) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (v) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
- (vi) Quashing decisions may impose heavy administrative burden on the administration and lead to increase an unbudgeted expenditure."

12. In the matter of Common Cause (supra) the Hon'ble Apex Court has relied upon the principles laid down in Tata Cellular's case while exercising judicial review of awarding contract by the Govt. Whereas the Hon'ble Apex Court in AIR 1996 SC 51 has held that while exercising the judicial review in the matter of the Govt. Contracts the Court cannot act as an appellate authority or examine the details of terms of the contract. Primary concern of Court is to see whether there is any infirmity in the decision making process. Similarly in the

case reported in (1997) 1 SCC 738 Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and others the Hon'ble Apex Court has held that the judicial review in the Govt. Contract, the Courts must keep in mind cost escalation of the project as a result of delay that would be caused by its interference.

13. In Raunag International Ltd. (Supra) Hon'ble Apex Court has held that in arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:

- (i) The price at which the other side is willing to do the work;
- (ii) Whether the goods or services offered are of the requisite specifications;
- (iii) Whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfill the requirements of the job is also important;
- (iv) The ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;
- (v) Past experience of the tenderer and whether he has successfully completed similar work earlier;
- (vi) Time which will be taken to deliver the goods or services; and often
- (vii) The ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

14. In view of the above law laid down by the Hon'ble Apex Court there is no doubt that the judicial review in the matter of Govt. contracts is permissible, but the Hon'ble Apex Court has laid down the criteria in which the judicial review is

permissible i.e. the Court cannot substitute its own decision and cannot work as an appellate Court. In the matter of the Govt. Contract it is not always necessary to award contract to the lowest tenderer and the scope of the judicial review the Apex Court has held that is very limited. Where the Court finds that the relevant procedure, rules and regulations are not adhered to and any other unjust and unfair procedure has been adopted by the authorities in the matter of awarding the contract, the Court does not sit as a Court of appellate but merely review the manner in which the decision was taken. The Court does not have expertise to review the administrative decision. If a review of the administrative decision is permitted, it would be substituting its own decision, without the necessary expertise which itself may be fallible. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts. The Govt. must have freedom of contract. In other words a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere.

15. In view of the above law laid down by the Hon'ble Apex Court I shall now proceed to examine the factual matrix of this case and to ascertain as to whether any principle laid down by the Apex Court in the matter of awarding the Govt. Contracts has been violated by the Respondents No. 1 to 3 so as to enable

this Court to exercise the power of judicial review of the decision arrived at by the Respondents.

16. As far as the question raised by the learned counsel for the petitioner that the respondents' decision for inviting all the tenderers for negotiation is illegal and contrary to the circular issued by the Central Vigilance Commission is concerned; the relevant circular is annexed with the petition as Annexure P/7. The first paragraph of this circular mentions that "exercise superintendence over the vigilance administration of the various Ministries of the Central Government or corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government." First of all it may be pointed out that this circular was issued to the Central Govt. Offices as the jurisdiction of the Central Vigilance Commission extends over the Central Govt. Offices and these guidelines were issued by the Central Vigilance Commission in order to curb the corruption whereas in the present matter the Govt. Madhya Pradesh Department of Works has prepared the manual and the same has statutory force therefore these guidelines issued by the Central Vigilance Commission cannot override the Manual prepared by the State Govt. in the matter of awarding contract. The provision contained in para 2.086 of Chapter-II of the Manual provides for negotiation under the head "Procedure for Negotiations of Tenderers". Clause (a) of para 2.086 provides that "all the tenderers who had tendered their rates in that particular tender for which the negotiations are considered suitably should be called for negotiations with a view to withdraw

conditions and reduce the rates. Clause (b) of para 2.086 provides that "wherever necessary common conditions should be prepared in consultation with the tenderers and fresh sealed offers should be obtained from them. While drawing common conditions it should be mentioned that only downward revision of rates would be permissible". Therefore, in view of the above I am of the considered opinion that the respondents No. 1 to 3 were well within their rights to invite the negotiated rates in a sealed envelope in order to get the better reduced rates, therefore, no illegality or arbitrariness has been committed in inviting the negotiated rates in sealed envelope. More over on this point the petition of the petitioner is misconceived. Not only the petitioner and Respondent No.5 but all the tenderer i.e. Shri Balaji Engicons Pvt. Ltd. had sent their revised rates in the sealed envelope and a fixed date, time and place for receipt and opening of the negotiated tenders was also given. It is not the allegation of the petitioner in the petition that at the time of opening of the envelope he was not invited. Therefore the allegation of the petitioner in para 5.7 of the petition is baseless, without foundation and without any basis. I may mention that while alleging such bald allegations against the Govt. officials the petitioner must be specific, cogent, reliable and based on convincing evidence. Such bald allegations are not permissible without any strong foundation and the party should always refrain from entering into such bald allegation, which are without any basis, rhyme or reason.

17. As argued by learned counsel for the respondents the petitioner himself negotiated and he himself submitted the

negotiated rates, when his rates were not found to be lowest then he cannot raise such grudge against the decision of the respondents.

18. On the other point also the argument of learned counsel for the petitioner is without any foundation that the lowest rate of the petitioner was disclosed to the Respondent No.5 for the reason that the revised rates quoted by the petitioner are 11.7% below the estimated cost where as the revised rates quoted by the Respondent No.5 are 14.7.% i.e. 3% less than the rates quoted by the petitioner. In the ordinary course if the Respondent No.5 had submitted revised rates after knowing the rates quoted by the petitioner then as per the human tendency the rates should have been 12% or odd and in any case it could not have been 3% less than the rates quoted by the petitioner. Therefore on this ground also the contention of the petitioner is baseless.

19. Therefore as per the M.P. Govt. Works Department Manual it was not obligatory or mandatory for the respondents to have invited only the petitioner for reducing the rates they have not acted against any Rules or Regulations as has been held by the Hon'ble Apex Court in the case of W.B. State Electricity Board(Supra), thus have adhered strictly with the rules.

20. Learned counsel for the petitioner also submitted that except in the case of Item No.18 in which the petitioner submitted his tender in other tender items the respondents have accepted the tender of the lowest tenderer without adhering to the negotiation process and it can be ascertained from the calling of records relating to the other tender items. In this

respect I.A.No. 6129/2003 has been filed by the petitioner to call for the record of the other tender items floated by the State by the same notice inviting tender. I am afraid that if the arguments advanced by the learned counsel for the petitioner is accepted then it will amount to entering into an investigation and the same cannot be accepted on the ground that this point has not been specifically raised in the petition and no opportunity has been given to the respondents to rebut the contention raised by the petitioner. It would be out of scope of this petition and it would amount to entering into the exercise without giving opportunity to the respondents to meet the same. Even by this interlocutory application the record of the other tender items cannot be called for in order to find out whether similar procedure has been adopted in those matters. As has been examined and discussed above the counsel for the petitioner could not make out a case for judicial review in this matter as the respondents have followed the Rules, Regulations and procedure as provided in the Manual clause meant for scrutinizing the tender. The petitioner has not been able to point out any action of the respondents, which can be termed as unjust, unfair, unreasonable or arbitrary. The respondents have acted in a most transparent manner as such I am of the opinion that the records relating to the other tender matters cannot be called for and scrutinize in this matter. The petitioner has not been able to establish that the action of the respondents No. 1 to 3 suffers from any vice of arbitrariness. More over, as has been discussed above and the law laid down by the Hon'ble Apex Court in the matter of exercising judicial review

concerning the Govt. contracts the Court cannot work as an investigator. The Court is simply required to look into the matter as to whether the Govt. authorities have acted as per the Rules, Regulations applicable in the matter or not.

21. In view of the above, the petitioner has not been able to make out a case to interfere with the decision arrived at by the Respondents No. 1 to 3, as the petitioner has not been able to point out any material irregularity or illegality committed by the respondents in the matter of inviting the tenders for negotiations and to submit their revised rates in a sealed envelope. But the pleadings of the parties make it clear that the action of the respondents was just, fair and left no room for what can be called as arbitrariness or unreasonableness.
22. In the result, the petition has no force the same is liable to be dismissed and is dismissed.

Sd/-
L.C.BHADOO
Judge

W.A. 29.2.03

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